Internal Revenue Service
memorandum

CC:FS:TL-N-409-92
CORP:LEGardner

date: NOV 20 1991

to: District Counsel, Manhattan CC:MAN
Attn: Diane Heller

from: Assistant Chief Counsel (Field Service) CC:FS

subject: [redacted]

This is a written response to your request for Field Service Advice, dated September 11, 1991.

ISSUE

Which corporation is the proper party to execute the Form 872 waiver to extend the period of limitations for assessment of the taxpayer's income tax for the taxable periods: (1) Beginning [redacted], and ending [redacted], and (2) the [redacted] calendar year, with respect to [redacted]. (hereinafter [redacted]) and [redacted] (hereinafter [redacted]).

CONCLUSION

In order to protect the position of the Service with respect to these taxable periods, we recommend that the district director take the various steps described below.

FACTS

Since there are multiple corporations having the same or similar names and multiple transactions, the taxpayers under audit will be referred to as [redacted] and [redacted]. The history of the [redacted] and [redacted] follows.

In the [redacted]'s, [redacted], a foreign company (hereinafter Foreign) sold the rights to use the name, [redacted], to [redacted], a domestic company. [redacted] paid Foreign royalties for the use of the name.

[redacted] owned [redacted] percent of the outstanding stock in [redacted]. [redacted] was one of the wholly owned subsidiaries of [redacted]. These corporations are not the taxpayers currently under audit. These subsidiaries filed consolidated returns with [redacted], as the parent/agent, for the taxable periods prior to [redacted].

In [redacted], Foreign wanted to buy back the right to use the name, [redacted], from [redacted]. [redacted] would only agree to the transaction if Foreign would agree to purchase the assets of the entire group, [redacted]. Foreign agreed. On [redacted], [redacted] sold the assets of this group to Foreign in exchange for cash.

Foreign set up two brother-sister domestic corporations, [redacted]. (hereinafter [redacted]) ([redacted]) and [redacted] (hereinafter [redacted]) ([redacted]).[1] Foreign owned [redacted] percent of the outstanding stock in both [redacted] and [redacted]. Foreign contributed many of the assets that were purchased from [redacted] to [redacted] and [redacted]. Both [redacted] and [redacted] had subsidiaries.

In [redacted] or [redacted], Foreign sold the assets of [redacted] to [redacted], a domestic corporation. Foreign retained the stock of [redacted] and planned to continue the operation of [redacted]. However, Foreign had sold the rights to use the name, [redacted]., when Foreign sold the assets of [redacted] to [redacted]. In order to continue the operation of [redacted], on [redacted], Foreign changed the name of [redacted] to [redacted].

On December 29, 1987, Foreign contributed its shares in [redacted] to [redacted]. Immediately thereafter, [redacted]., merged [redacted] into [redacted]., effective [redacted]. Pursuant to the merger agreement, all of the property, rights, privileges, and franchises of [redacted] became the possession of [redacted]., and [redacted]., assumed all of the liabilities and obligations of [redacted]. As a result of the merger, [redacted] went out of existence. On the same date, pursuant to the merger agreement, the surviving corporation, changed its name to [redacted].

The taxpayer has claimed that the above transaction was a reorganization, pursuant to section 368(a)(1)(A). We note that this characterization has not been disputed. The taxpayer has also claimed that the contribution by Foreign of the stock of [redacted] to [redacted] was effected in order to benefit from a Delaware short form merger. You have not questioned this treatment either. Therefore, we offer no comment with respect to either. The resulting corporation, [redacted], retained the [redacted]

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[1] On [redacted], [redacted] and [redacted] were incorporated under the General Corporation Laws of [redacted]. On [redacted], [redacted] changed its name to [redacted]. On [redacted], [redacted] changes its name to [redacted].

number of [redacted] ([redacted]). We are predicating our recommendations on the fact that there have been no changes in the corporate structure of these corporations since this transaction. Please notify this office if this factual assumption proves to be incorrect.

The Service is auditing the returns of [redacted] and [redacted] for the taxable periods beginning [redacted], and ending [redacted], and the calendar year [redacted]. Your office has requested our advice as to which corporation is the proper party to execute the Form 872 waiver for both [redacted] and [redacted] for the taxable periods in question.

For the taxable period beginning [redacted], and ending [redacted] ([redacted]) filed a separate return on [redacted]. In [redacted], a Form 872 was executed by a corporate officer of either [redacted] or [redacted] to extend the period of limitations to [redacted]. The agent should verify whether the officer was an officer of [redacted] or [redacted] and whether the officer was signing on behalf of [redacted] or [redacted].

For the [redacted] calendar year, [redacted] ([redacted]) and its subsidiaries filed a consolidated return on [redacted]. In [redacted], a Form 872 was executed by a corporate officer of [redacted] or [redacted] to extend the period of limitations to [redacted]. The agent should verify whether the officer was an officer of [redacted] or [redacted] and whether the officer was signing on behalf of [redacted] or [redacted].

For the taxable period beginning [redacted], and ending [redacted], and for the taxable year [redacted], [redacted] and its subsidiaries filed a consolidated return. In [redacted], a Form 872 was executed by a corporate officer of [redacted] to extend the period of limitations to [redacted]. No other Form 872's have been obtained with respect to [redacted] for this taxable period.

For the [redacted] calendar year, [redacted] and its subsidiaries filed a consolidated return on [redacted]. In [redacted], a Form 872 was executed by a corporate officer of [redacted] ([redacted]) to extend the period of limitations to [redacted]. No other Form 872's have been obtained with respect to [redacted] for this taxable period.

DISCUSSION

The common parent of a consolidated group is the sole agent for each subsidiary in the group. Treas. Reg. § 1.1502-77(a). Thus, generally, the common parent is the proper party to sign consents, including the Form 872 waiver to extend the period of limitations, for all members in the group. Treas. Reg. § 1.1502-

77(a). Generally, the common parent for a particular consolidated return year remains the common parent agent for purposes of extending the period of limitations with respect to that group even though that corporation is no longer the common parent of that group when some action, such as an extension, needs to be taken for that year.

There are exceptions to this general rule. First, the general rule does not apply when the common parent is not in existence at the time such action is necessary. The common parent is considered to have gone out of existence when it formally dissolves under state law or merges into another corporation in a merger in which it is the nonsurviving corporation under the applicable state law.

The position of the Service is that a merger terminates the common parent's agency because, under most state laws, the nonsurviving, merged corporation goes out of existence. It must be determined whether the corporation's existence actually terminated under the state's merger statute. However, when a common parent merges with another corporation and is the surviving corporation, the position of the Service is that it remains the agent for the consolidated return years for which it was the common parent.

[redacted] went out of existence as a result of the merger into [redacted]. Under Delaware law, when a corporation merges into another corporation, the merged corporation ceases to exist. DEL. CODE ANN. tit. 8, § 259 (1983). If there is an action or proceeding pending against a corporation which is a party to a merger, the surviving corporation may be substituted in such action or proceeding. DEL. CODE ANN. tit. 8, § 261 (1983). You informed this office that it was unlikely that an audit was being conducted for the years in question prior to the merger.

[redacted]

Taxable period-[redacted], through [redacted]

The district director obtained a Form 872 from [redacted] to extend the period of limitation to [redacted] for this taxable period. The Form 872 was signed by a corporate officer of [redacted]. We do not know whether this officer was an officer of [redacted] or [redacted]. Since [redacted] went out of existence in the merger in [redacted], the proper party to sign a Form 872 would not have been [redacted]. If the officer was an officer signing on behalf of [redacted], the form is invalid because [redacted] was not in existence at the time the form was executed. Even if the officer was an officer signing on behalf of [redacted], the validity of the form is still questionable because we do not have sufficient information to determine which group continued, the [redacted] or [redacted] group. Therefore, we recommend that the district director obtain a Form 872 to extend the period of limitations in the same manner, with the view that the taxpayer may not challenge the validity of such forms. If the taxpayer challenges the validity of the forms as an affirmative defense, the Service may be forced to concede the case. However, before doing so, we recommend that you contact this office for advice on whether there may be possible arguments to counter this affirmative defense.

Taxable period [redacted]

A Form 872 was obtained from [redacted] for this taxable period. For the same reasons as explained above, we cannot determine whether the Form 872 is valid. Therefore, we recommend that you obtain a Form 872 in the same manner as done previously.

In order to further protect the position of the Service with respect to the [redacted] taxable period, we advise you to obtain Form 2045 from [redacted] in order for [redacted] to admit its status as transferee and also obtain a Form 977 (a consent to extend the statute of transferee liability) from [redacted], as a transferee of [redacted], with regard to the [redacted] consolidated tax liability of [redacted]. The period of limitation for transferee liability does not expire until [redacted]. The [redacted] return was filed on [redacted]. Pursuant to section 6501(a), the period of limitation for assessment of the taxpayer's income tax expires three years after the return is filed or [redacted]. Pursuant to section 6901, the period of limitation for assessment of tax liability of a transferee is one year after the expiration of the period of limitation for assessment against the transferor or [redacted].

[redacted]

[redacted] remained in existence as a result of the merger. Therefore, [redacted], formerly [redacted], is the proper party to sign a Form 872 to extend the period of limitations for both taxable periods.

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If you have any questions regarding this matter, please contact Lorraine E. Gardner at (FTS) 566-3335.

DANIEL J. WILES

By: Alford Bishop

ALFRED C. BISHOP, JR.
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